UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IAN POLLARD, on behalf of himself and all others similarly situated, Plaintiffs, v. REMINGTON ARMS COMPANY, LLC, et al. Defendants.	)	Case No. 4:13-CV-00086-ODS

DEFENDANTS' MOTION TO STRIKE CERTAIN EXHIBITS CITED IN THE SUGGESTIONS IN REPLY TO PROPONENTS' OPPOSITION TO THE OBJECTIONS OF LEWIS FROST AND RICHARD L. DENNEY

Defendants respectfully request that the Court strike certain exhibits submitted by Objectors Lewis Frost and Richard L. Denney in their Reply brief because they raise new arguments and evidence that could have been raised in their original motion.

I. ARGUMENT

Lewis Frost and Richard Denney ("Objectors") have submitted a 298-page Reply brief (counting exhibits) that includes new arguments and evidence that should have been (and could have been) presented in their original motion. Relying on a new survey conducted by Mr. Hilsee, the Objectors reargue that mailed notice is required here and criticize the "analytical methodology" for the conclusions reached by Stephen Weisbrot and Matthew Garretson.[1] Doc. # 198 at 3-6. In further support of these arguments, Objectors append a declaration from a brand new proposed expert, Mr. Smith, who challenges the Parties' radio program that was submitted to the Court last June. Doc. # 198-4. Defendants respectfully request that the Court strike: (1)

[1] This, on its face, is telling. Mr. Weisbrot has not submitted a declaration in this case since August 2016. Doc. # 139-1. Clearly, the Objectors should have raised any issue with his opinions in their November 2016 objection.

the new SurveyMonkey® study commissioned by Mr. Hilsee, Doc. # 198-2 at 5, Exhibit 4; and (2) the declaration of David L. Smith. Doc. # 198-4.[2]

It is inappropriate for the Objectors to rely on these new arguments and evidence in support of their Reply brief. First, the Court required any objector to "file such objections and comments *and all supporting pleadings* on or before November 18, 2016." Doc. # 140 ¶ 14. The Objectors' new evidence is an improper attempt to circumvent this order. Second, courts within this district disfavor raising new arguments and evidence for the first time on reply. *E.g., Gilmor v. Preferred Credit Corp.*, No. 10-0189-ODS, 2011 WL 111238, at *2 n.3 (W.D. Mo. Jan. 13, 2011) ("the Court agrees with Plaintiffs that the moving defendants were required to provide such information and arguments in their original motion and not wait until the Reply Suggestions were filed."); *Lang v. Kansas City Power & Light Co.*, 199 F.R.D. 640, 653 (W.D. Mo. 2001) (noting that "[m]oving parties are not allowed to wait until their reply suggestions to advance arguments and provide expert support for their positions. . . ."). Courts within this district recognize that considering new arguments and evidence raised for the first time on reply would deprive the defendant of a meaningful opportunity to respond. *E.g., McDaniel v. Lombardi*, No. 2:16-cv-04243-NKL, 2016 WL 7494473, at *4 (W.D. Mo. Dec. 30, 2016) ("The Court rarely relies on new arguments in reply briefs because the respondent did not have an opportunity to respond.").

The Objectors rely on Mr. Hilsee's newest, voluminous affidavit (and the exhibits attached) to bolster their criticisms of electronic notice methods. The exhibits attached to Mr.

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[2] Several other exhibits have been submitted for the first time with the Objectors' Reply brief, including new declarations from both Mr. Denney and Mr. Frost, the substance of which could have been raised previously. For example, Mr. Frost contends that various aftermarket triggers from other manufacturers can be used as retrofits for Models 600, 660, XP-100, 721, and 722. Doc. #194-7 at 3-4. Not only could this issue have been included in Mr. Frost's prior declaration, it is unclear why Mr. Frost advances it at all, given that he does not even own one of these models. *See* Doc. #150-1 (Frost declaration stating he owns three Model 700s).

Hilsee's affidavit include a SurveyMonkey® study that Mr. Hilsee commissioned in December 2016 regarding survey participants' feelings toward U.S. mail versus e-mail. Methodology and validity aside, the SurveyMonkey® study could have been commissioned by Mr. Hilsee well before December 2016 and included in either his July 2016 amicus brief or the Objectors' November 2016 brief. To be sure, Mr. Hilsee extensively criticized the Parties' supplemental notice plan—including the use of electronic notice methods—in his previous filings, which span nearly 350 pages. Docs. ## 134, 150-3.

The Court also should decline to consider the newly submitted expert declaration of David L. Smith, which likewise was raised for the first time in the Objectors' Reply brief and argues points that could have been raised prior. *See Lang*, 199 F.R.D. at 653. Mr. Smith challenges the Parties' national radio campaign, including the approach taken to target potential class members, as well as coverage and impressions data provided. Doc. 198-4 at 2-6. But the Parties set forth their plan and approach in June 2016, and the Court adopted it in August 2016. Doc. # 127-1; Doc. # 140. Mr. Smith's critiques are untimely.[3] Mr. Smith also takes issue with the Parties' social media campaign, the hunter-sportsman model utilized in developing it, and the resulting number of class members reached. But each of these points was previewed in the Parties' June 2016 filing and should have been addressed in the Objectors' initial filing. Doc. 127-1 at 5-22. The Objectors offer no compelling justification for submitting Mr. Smith's belated opinions in their Reply brief.

[3] Even if Mr. Smith's opinions were to be considered, he concludes that "[i]t is doubtful the combined radio reached more than 20% of its target." Doc. # 198-4 at 6. But this is a supplemental notice program that was designed to build upon the Parties' original notice efforts, which satisfied Due Process with a 73.7% reach percentage and an average frequency of 2.91 times. Doc. # 127-4 at 7.

II. CONCLUSION

Defendants respectfully request that the Court strike: (1) the new SurveyMonkey® study commissioned by Mr. Hilsee, Doc. # 198-2 at 5, Exhibit 4; and (2) the declaration of David L. Smith. Doc. # 198-4.

Date: February 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2017, I filed the foregoing document with the clerk of the court using the court's CM/ECF system, which will serve electronic notice on all parties of interest.

s/ John K. Sherk

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